

No. 14413

United States
Court of Appeals
for the Ninth Circuit.

CHARLES TESSEYMAN,

Appellant,

vs.

JOHN W. FISHER, LURENE W. FISHER and
UNITED STATES OF AMERICA,

Appellees.

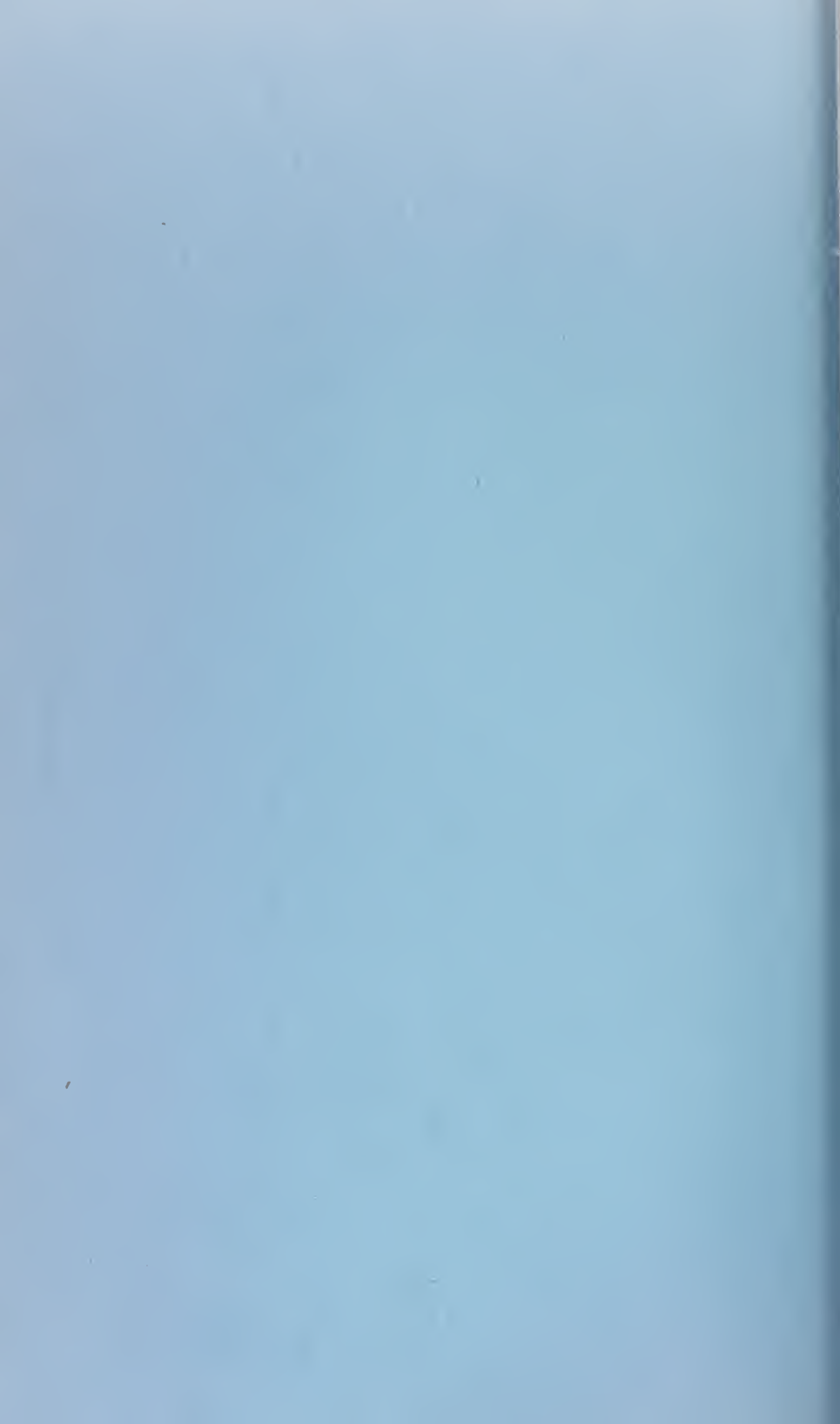
Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division.

FILED

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PAUL P. O'BRIEN
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

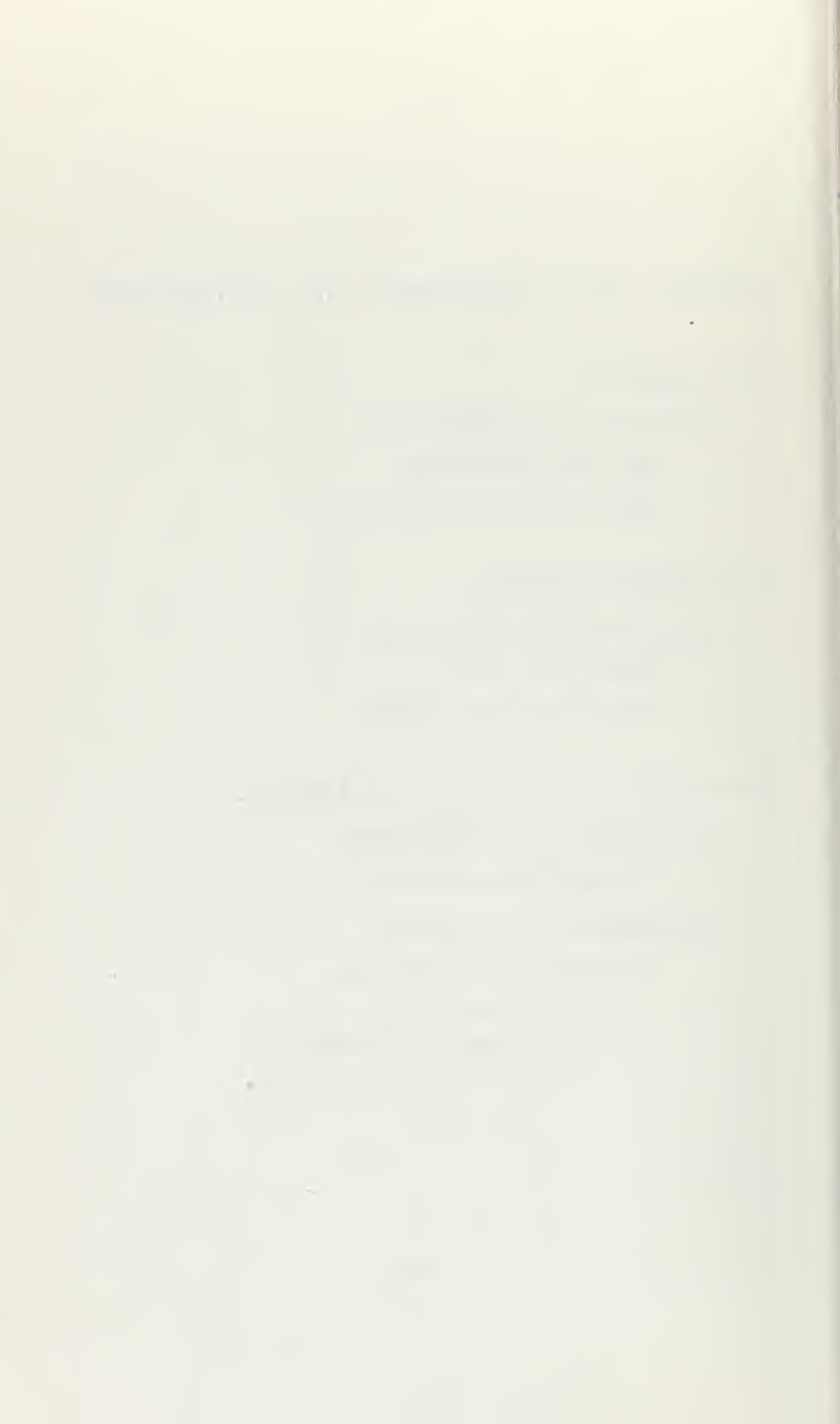
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For Appellees Fisher:

COURTNEY L. MOORE,
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For Appellee United States of America:

LAUGHLIN E. WATERS,
United States Attorney;
ROBERT H. WYSHAK,
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Los Angeles 12, Calif.



United States District Court for the Southern
District of California, Central Division

No. 15662-T

JOHN W. FISHER and LURENE W. FISHER,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

PETITION FOR REMOVAL

To the United States District Court for the South-
ern District of California, Central Division:

Your petitioner, the United States of America,
defendant in the above-entitled action respectfully
shows:

I.

On the 10th day of June, 1953, the United States
Attorney for the Southern District of California,
was served with a Summons and Complaint to quiet
title in an action filed in the Superior Court of the
State of California, in and for the County of San
Luis Obispo, as No. 19926, entitled John W. Fisher
and Lurene W. Fisher, Plaintiffs, vs. The United
States of America, Defendant. A true copy of said
summons and complaint is attached hereto and
marked Petitioner's Exhibit "A." Said Petition-
er's Exhibit "A" is a copy of all process, pleadings
and orders in this action served on said United

States Attorney. The time within which your petitioner is permitted to file the petition for removal of this suit to the United States District Court has not [2*] yet expired.

II.

Plaintiffs are seeking to quiet title to the real and personal property described in the complaint. Title 28 United States Code § 2410 sets out the consent of the United States of America, under certain conditions, to be named a party in a civil action to quiet title to real or personal property on which the United States has, or claims, a lien. The complaint alleges that this defendant claims an interest in said property because of certain Internal Revenue tax liens of record against Elaine Frances Tesseyman and Charles Tesseyman.

III.

The United States is given authority by 28 United States Code, Sections 1444 and 84 (b)(2), to remove this action from the Superior Court of the State of California, in and for the County of San Luis Obispo, to the United States District Court for the Southern District of California, Central Division.

Wherefore, your petitioner prays that this action be removed to this United States District Court for the Southern District of California, Central Division.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Dated: This 29th day of June, 1953.

WALTER S. BINNS,
United States Attorney;

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistants United States
Attorney;

EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue;

/s/ EDWARD R. McHALE,

Attorneys for Defendant-Petitioner, United States
of America.

Duly verified. [3]

PETITIONER'S EXHIBIT A

In the Superior Court of the State of California
In and for the County of San Luis Obispo

No. 19926

JOHN W. FISHER and LURENE W. FISHER,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

SUMMONS

Action brought in the Superior Court of the State
of California, in and for the County of San
Luis Obispo, and the Complaint filed in the
office of the County Clerk of said County.

The People of the State of California Send Greet-
ing to

The United States of America, Defendant.

You are Hereby Directed to Appear and answer
the complaint in an action entitled as above brought
against you in the Superior Court of the State of
California, in and for the County of San Luis
Obispo, within ten days after the service on you of
this Summons, if served within this County; or
within thirty days if served elsewhere, except that
if the action is against the State pursuant to Section

738.5 of the Code of Civil Procedure, within 180 days.

And you are notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and the Seal of the Superior Court of the State of California, in and for the County of San Luis Obispo, this 4th day of June, 1953.

[Seal]

A. E. MALLAGH,
Clerk,

By MARGARET MUZIO,
Deputy Clerk.

Appearance: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of appearance, or when an attorney gives notice of appearance for him." (Sec. 1014 C.C.P.)

Answers or demurrers must be in writing, in form pursuant to rule of Court, accompanied with the necessary fee, and filed with the Clerk. [5]

In the Superior Court of the State of California,
In and for the County of San Luis Obispo

No. 19926

JOHN W. FISHER and LURENE W. FISHER,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Now Come the above-named plaintiffs and complain of the above-named defendant, and for cause of action allege:

I.

That plaintiffs are now and were at all times herein mentioned, husband and wife;

II.

That the Nash Building Company, Inc., is now, and was at all times herein mentioned, a corporation, organized and existing under and by virtue of the laws of the State of California and transacting business therein;

III.

That the plaintiffs are now and were at all times herein mentioned the owners in fee simple absolute of that certain real and personal property situate, lying and being in the County of San Luis Obispo, State of California, and particularly described as follows:

All that part of the West half of the Northwest quarter of Section 25, in Township 30 South, [6]

Range 12 East, Mount Diablo Base and Meridian, in the County of San Luis Obispo, State of California, more particularly described in the deed to John W. Fisher, et al., recorded in Book 455, Page 229 of Official Records on September 29th, 1947.

Together with the fixtures, stock in trade and personal property located at and in and on said real property above described. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining.

IV.

That defendant, the United States of America, is now and was at all times herein mentioned, a corporation sovereign;

V.

That said defendant claims and asserts an interest in said real and personal property hereinbefore described adverse to the ownership of the plaintiffs.

VI.

That said claim of said defendant arises out of the following facts: That on or about the 23rd day of March, 1949, plaintiffs herein as owners agreed to sell to the Nash Building Company, Inc., a corporation, the real and personal property described in Paragraph III hereof for the sum of \$155,000.00, and the said Nash Building Company, Inc., agreed to pay said sum to the plaintiffs herein; that said agreement of sale was in writing and consisted of

escrow instructions delivered by the plaintiffs herein together with the deed and bill of sale of said property to the Title Insurance and Trust Company, a corporation, at their office in San Luis Obispo. Said sum of \$155,000.00 to be paid on or before April 10, 1949, to the plaintiffs by the said Nash Building Company, Inc., upon an issuance of title insurance policy by said Title Insurance and Trust Company, and said deed and bill of sale were not to be delivered until the purchase amount of \$155,000.00 was paid into escrow. Time was made of the essence of said sale. That thereafter, on [7] April 11, 1949, said contract of sale and purchase set forth in said escrow instructions was amended and supplemented whereby the Nash Building Company, Inc., assumed the payment of an existing mortgage to the Bank of America and agreed through said escrow to pay to the plaintiffs herein the balance of said purchase price on or before August 15, 1949. That said Nash Building Company, Inc., did not, on August 15, 1949, or at any other time, or at all, pay the balance of said purchase price, less cost. Thereafter, on or about March 31, 1950, plaintiff herein caused to be served on said Nash Building Company, Inc., a demand that the balance of said purchase price be paid within 15 days from said March 31, 1950, to wit—by April 16, 1950; that thereafter, on April 21, 1950, plaintiffs herein caused to be filed in the Superior Court of the State of California, in and for the County of San Luis Obispo, a complaint against the said Nash Building Company, Inc., praying for judgment of the unpaid balance of

said purchase price in the amount of \$33,083.26, their pro rata of taxes, insurance, costs of suit and such other relief as the Court deemed proper. That said action was entitled: "John W. Fisher and Lurine W. Fisher vs. the Nash Building Company, Inc., a corporation, George B. Jovick, Charles Tesseyman, et al." At the time of the filing of said complaint, to wit—on April 21, 1950, plaintiffs caused to be recorded in the County Recorder's office of San Luis Obispo, in accordance with CCP of the State of California Section 409, a lis pendens giving notice of the pendency of said action to the world. That thereafter, on or about the 22nd day of December, 1950, said action came on duly and regularly to be heard and on said date a judgment was made, rendered and entered in said action in favor [8] of the plaintiffs for the recovery of \$37,001.17 from the defendant, the Nash Building Company, Inc., which judgment further ordered the sale of said real and personal property to pay said monetary judgment, said sale to be made by the Sheriff of the County of San Luis Obispo, State of California; that in accordance with said judgment after due and regular proceedings had to that end, the said Sheriff of the County of San Luis Obispo, State of California, did, on the 3rd day of May, 1951, conduct said sale in accordance with the judgment and order of said Court, and sold said property to the plaintiffs herein for the sum of \$37,168.43, subject to the mortgage held by the Bank of America, NT&SA, which said amount paid in full said monetary judgment. The plaintiff at

said sale was the highest and best bidder. That thereafter, on the 6th day of May, 1952, said Sheriff of the County of San Luis Obispo, State of California, executed and delivered his deed to the above-described real and personal property to the plaintiffs herein. That more than one year has elapsed since the delivery and recordation of said deed to the plaintiff from said Sheriff. That claim of said defendant which constitutes a cloud on the title of these plaintiffs, arises out of the filing with the County Recorder of the County of San Luis Obispo, State of California, of two income tax liens, which said tax liens were filed on April 27, 1950, after commencement of the action of "Fisher vs. Nash Building Company, Inc., et al.," and after the filing of the lis pendens hereinbefore mentioned, namely, a lien for \$12,568.43 claimed to be owed to the United States of America from Elaine Frances Tesseyman on account of income tax, and a lien for \$31,037.54 claimed to be owed to the United States of America from Charles Tesseyman on account of income tax.

VII.

That at no time did the defendant intervene or appear in [9] said action entitled "John W. Fisher and Lurine W. Fisher vs. The Nash Building Company, Inc., a corporation, et al." and set up any claim of any character that it might have by reason of said claimed tax liens against Elaine Frances Tesseyman and Charles Tesseyman, and as a result thereof said defendant is estopped by said judgment.

VIII.

That by 28 USCA Section 2410, the United States of America may be named as a party defendant in a civil action or suit to quiet title.

Wherefore plaintiffs pray that said defendant be required to set forth the nature of its claims and that said claims may be determined by decree of the Court, and that by said decree it be declared and adjudged that said plaintiffs are the owners of the said premises and that said defendant has no interest in or to said land and premises; and that said defendant be forever barred from asserting any claim whatever in or to said land and premises adverse to the plaintiffs, and for such other and further relief as to equity shall seem meet.

COURTNEY L. MOORE,
Attorney for Plaintiffs.

State of California,
San Luis Obispo—ss.

John W. Fisher, being first duly sworn, deposes and says:

That he is one of the plaintiffs named in the above-entitled complaint; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

JOHN W. FISHER.

Subscribed and sworn to before me this 4th day of June, 1953.

A. E. MALLAGH,
County Clerk and Ex Officio Clerk of the Superior
Court, County of San Luis Obispo, State of
California.

MARGARET MUZIO,
Deputy Clerk.

[Endorsed]: Filed June 4, 1953.

[Endorsed]: Filed June 29, 1953. [10]

United States District Court for the Southern
District of California, Central Division
Civil No. 15662-T

JOHN W. FISHER and LURENE W. FISHER,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

ANSWER

Comes Now, the defendant, United States of America, and answering plaintiffs' complaint to quiet title to real property, admits, denies and alleges:

I.

Admits the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof.

III.

Denies the allegations contained in paragraph III thereof.

IV.

Admits the allegations contained in paragraph IV thereof.

V.

Admits the allegations contained in paragraph V thereof.

VI.

This defendant is without knowledge or information sufficient to [11] form a belief as to the truth of the matters alleged in paragraph VI except that it admits the allegations of recording the recorded documents described therein, but denies any allegations of fact or conclusions of law contained in said documents, and except that defendant admits that it filed liens against Elaine Frances Tesseyman in the sum of \$12,568.43 and against Charles Tesseyman for the sum of \$31,037.54. In connection with said liens, defendant further alleges that the lien against Elaine Frances Tesseyman has been paid in full and that with respect to Charles Tesseyman, that on or about March 18, 1949, the Commissioner of Internal Revenue assessed against Charles Tesseyman income taxes for the year 1944 in the sum of \$23,717.19 taxes and \$5,635.92 interest, for a total assessment of \$29,353.53, and for 1945 income taxes in the sum of \$1,430.36 taxes and \$254.07 interest, for a total assessment of \$1,684.43; that the assessment list showing the assessment of the aforesaid taxes and interest was received in the

office of the Collector of Internal Revenue for the First District of California on or about March 18, 1949; notice and demand for the payment of the taxes and interest so assessed was made on the taxpayer shortly thereafter, and the sum of \$6,633.27, and no more, was paid in behalf of the 1944 taxes and the sum of \$1,684.43 was paid in behalf of the 1945 taxes, which totally satisfied the sum due on the 1945 taxes; on or about April 27, 1950, a notice of tax lien was filed in the office of the County Recorder of San Luis Obispo County, California, covering said taxes and interest in the total sum of \$31,037.54; remaining due, owing and unpaid is the sum of \$24,187.49 representing the balance of the assessment of the 1944 taxes, together with statutory interest which accrues on said balance at the rate of six per centum per annum from May 16, 1949, until paid; lien recording fees of \$1.00 have been incurred.

VII.

Denies the allegations contained in paragraph VII thereof.

VIII.

Admits the allegations contained in paragraph VIII thereof. [12]

As a Second, Separate and Alternative Defense, Defendant States That Paragraph VII of the Complaint Fails to State a Claim Against Defendant Upon Which Relief May Be Granted.

As a Third, Separate and Affirmative Defense, This Defendant Alleges as Follows :

I.

Defendant is informed and believes and based on its information and belief alleges that the plaintiffs entered into an escrow for the sale of the property described in paragraph III of the complaint and authorized the completion of the escrow and the delivery of the title to the property to the purchaser upon receipt of consideration in excess of \$120,000.00.

II.

That by completion of the escrow the taxpayer, Charles Tesseyman, acquired an interest in said property and the liens of the United States attached to his interest as alleged in paragraph VI of our answer hereinabove.

III.

That defendant is informed and believes and based on its information and belief alleges that plaintiffs brought suit against Nash Building Company, Inc., and Charles Tesseyman for the unpaid balance of the purchase price and treated said escrow as having been completed and did not elect to rescind the contract of sale.

IV.

That the plaintiffs are bound by their election in suing the Nash Building Company, Inc., and Charles Tesseyman and are therefore estopped from claiming any ownership interest except that which

results out of the judgment and deed of the Sheriff made on or about May 6, 1952, to plaintiffs.

Wherefore, having fully answered, the defendant prays that the Court adjudge the respective rights of the parties appearing in this action; that the property described in plaintiffs' complaint be sold as provided by law; that the proceeds of such sale be applied, first, to the expenses of such [13] sale and that the balance of such proceeds, if any, be applied in accordance with the priorities of the parties hereto as determined by law; that this defendant have its costs of suit in this behalf expended; that it have such other and further relief as to the Court may seem meet and proper in the premises.

LAUGHLIN E. WATERS,
United States Attorney;

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistants United States
Attorney;

EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue.

/s/ EDWARD R. McHALE,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 15, 1953. [14]

United States District Court, Southern District of
California, Central Division

Civil No. 15662-T

JOHN W. FISHER and LURENE W. FISHER,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

CHARLES TESSEYMAN,

Applicant for Intervention.

MOTION TO INTERVENE AS A DEFENDANT

Charles Tesseyman moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the ground that he is the owner of a legal and equitable right, estate, interest and claim in and to the real property involved in the litigation and that any and all right, title and interest claimed by the plaintiffs in said action in regard to said property is founded and rests upon a judgment of a court of the State of California which, on the face of the judgment-roll and the record in the action in which it was rendered and entered and otherwise, is shown to be null and void for lack of jurisdiction of the subject matter and, also, to have been procured by said plaintiffs through collusion and connivance with the Nash Building Company, Inc., and George H.

Jovick, defendants in said state court action, and their attorney Courtney L. Moore, who is now appearing in his real role as the attorney for the plaintiffs Fisher in the above-entitled action, and by reason of such matters and things and conditions this applicant for intervention has a defense to plaintiffs' alleged cause [16] and claim to relief against the federal income tax lien, presenting both questions of law and of fact which are common to the main action.

/s/ HENRY. J. KLEEFISCH,
Attorney for Charles Tesseyman, Applicant for
Intervention.

NOTICE OF MOTION

To: Courtney L. Moore, Attorney for Plaintiffs.

To: Laughlin E. Waters and Robert H. Wyshak,
Attorneys for Defendant.

Please take notice, that the undersigned will bring the above motion on for hearing before the above-mentioned United States District Court at courtroom No. 6, Federal Building, City of Los Angeles, County of Los Angeles, State of California, on the 29th day of March, 1954, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ HENRY J. KLEEFISCH,
Attorney for Charles Tesseyman, Applicant for
Intervention. [17]

[Title of District Court and Cause.]

INTERVENER'S ANSWER

First Defense

1. Intervener admits the allegations stated in paragraphs numbered 1, 2, 4, and 5 of the plaintiffs' complaint herein; denies the allegations in paragraph numbered 3, and denies the allegations in paragraph numbered 7 insofar as they assert that the United States of America is estopped from asserting any right or claim it has or might have under the Internal Revenue laws and regulations and its tax liens against this intervener, Charles Tesseyman, either severally or jointly with Elaine Tesseyman, his wife.

2. Intervener admits that an income tax lien in favor of [18] the defendant United States of America and against this intervener for \$31,037.54 and against Elaine Tesseyman for \$12,568.43 was filed in the office of the Recorder for the county of San Luis Obispo, state of California, on April 27, 1950, as in paragraph 6 of plaintiffs' complaint alleged, and this intervener further answers the allegations and matter set forth in said paragraph 6 as follows:

a) He denies that on March 23, 1949, or thereabouts the plaintiffs herein, John W. Fisher and Lurene W. Fisher, or either of them, agreed to sell to the Nash Building Company, Inc., a corporation, the real property or the personal property described in paragraph 3 of their complaint herein,

and alleges and says that on and prior to the 17th day of February, 1949, the said plaintiffs were the owners only of a three-fourths interest in said property, and Cleo S. Clinton and Loretta I. Clinton were the owners of the other one-fourth interest in said property, and all of them had made and executed and deposited with the Title Insurance and Trust Company, at its office in the city of San Luis Obispo, a deed to said real property to said Nash Building Company, Inc., together with a bill of sale to the said personal property, and the said Nash Building Company, Inc., had made and executed with a title company a deed to said real property to this intervener, Charles Tesseyman, together with a bill of sale to said personal property, for the purpose and object of inducing and inveigling this intervener to make and execute, and to deliver, to said Nash Building Company, Inc., the title papers necessary to transfer to it and by which he did transfer and convey to it the title and ownership of certain real property and personal property situate in the city and county of San Francisco, state of California, of the fair and reasonable market value of \$165,000, and which was subject only to an encumbrance of \$56,000.00;

Thereafter, and on or about the 23rd day of March, 1949, and [19] after the property so obtained from this intervener had been disposed of by and through the said Nash Building Company, Inc., a form or manner of agreement purporting to be an agreement of sale and purchase between the said

John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton, as the apparent sellers, and the Nash Building Company, Inc., as the apparent buyer, was made up and prepared by said Title Insurance and Trust Company and was signed by the said parties thereto; that said alleged agreement consists entirely of escrow instructions and was so made up and prepared by said title company at the special instance and sole direction of George H. Jovick, the president and one of the only two stockholders of the said Nash Building Company, Inc.; that said alleged agreement contemplated the sale and purchase of said real property and personal property including stock-in-trade for a lump sum and at all times was and is such that it could not be specifically enforced nor made the basis of an action for foreclosure of a vendors' lien for the unpaid purchase price of land, in equity, for the reason stated herein that it undertakes and contemplates the sale and purchase, and on its face shows itself to be a contract in form for the sale and purchase, of real property and personal property including stock-in-trade, for a lump sum of \$147,500.00.

b) Intervener admits that on April 11, 1949, said alleged agreement of sale and purchase was amended and he alleges that Cleo S. Clinton and Loretta I. Clinton then were fully paid for their one-fourth interest in and to said property and they were so paid by and with moneys obtained by said Nash Building Company, Inc., and the plaintiffs

herein from the sale and disposition of the property obtained from this intervener as hereinbefore set forth and alleged, and thereupon the said Clintons ceased to have any rights or interest in the real property involved in this litigation, or under the said alleged agreement and escrow. He admits [20] that on and under date of April 21, 1950, an action was commenced in the superior court of the state of California, in and for the county of San Luis Obispo, by the plaintiffs herein, John W. Fisher and Lurene W. Fisher, as alleged and purported sole owners of the property involved in this litigation, and against the Nash Building Company, Inc., and George H. Jovick and this intervener, and that they caused a notice of the pendency of said action to be recorded as in their complaint herein alleged; and this intervener alleges and says that said action was one in equity for the specific performance of aforesaid alleged agreement of sale and purchase of both real property and personal property including stock-in-trade for a lump sum as aforesaid, and was and is numbered No. 17,800 upon the records of said superior court. He denies that by reason of any fact, and that by reason of any condition, and that by reason of the facts and conditions set forth in the plaintiffs' complaint herein, they had any cause of action or any ground for invoking the aid of a court of equity in said action No. 17,800, or upon which the equitable jurisdiction of the court could or did attach; that prior to and at the time of the commencement of said action No. 17,800 this

intervener had commenced and there was then pending in said superior court an action, in equity, to determine rights, claims and interests in and to said real property and said personal property asserted by the said John W. Fisher, Lurene W. Fisher, Cleo S. Clinton, Loretta I. Clinton, Nash Building Company, Inc., and the latter's two stockholders, George H. Jovich and Leonard R. Jacobson, adverse to this intervener, and to compel the delivery by them to him of the title papers to said real and personal property; that said action was commenced by this intervener on March 10, 1950, and was and is numbered No. 17,745 upon the records of said superior court and concurrently with the commencement of said action he caused a notice of pendency of said action, its nature, purpose and object, to be recorded in the office of the [21] Recorder for the County of San Luis Obispo, State of California; a copy of the complaint in said prior action No. 17,745 is attached hereto, marked Exhibit A, and made a part of this answer; that in and by said action No. 17,745 the said superior court acquired complete and exclusive jurisdiction of the said real property and personal property and of any and all rights and interests claimed by the plaintiffs in the subsequent action No. 17,800 and herein with respect to said property; that prior to the commencement of the latter action by them they had been served with a copy of the summons and complaint in said prior action and thereafter appeared and submitted their alleged claims to the court in said action.

Intervener further alleges and says that he appeared and filed an answer in said action No. 17,800 wherein he denied all the rights and equities undertaken to be set up and claimed by the said John W. Fisher and Lurene W. Fisher, the plaintiffs therein, and he specifically alleged and pleaded by way of defense that no agreement, written or oral, enforceable or capable of being enforced by an action for specific performance of contract appears from or is shown by the allegations of the complaint in said action and the exhibits attached thereto, to exist as to either the said real or personal property, the only agreement in respect of which specific performance was thereby sought being the alleged escrow agreement hereinbefore described, purportedly for the sale and purchase of real property and personal property including stock-in-trade, for a lump sum; and, also, the commencement and pendency of the said prior action No. 17,745; a copy of said answer is attached hereto, marked Exhibit B, and made a part of this answer.

c) Intervener admits that on or about the 22nd day of December, 1950, the said came on to be heard in said superior court upon the issues joined by the complaint and answer of this intervener, the Nash Building Company, Inc., and George H. Jovick not having appeared and filed any pleading and their default for [22] failure so to do was entered, and a form and manner of trial was had in said cause, the trial judge permitting this intervener to introduce in evidence the record and files of the court in

said prior action, but denying him the right to establish any right or claim to said real and personal property that would tend to defeat the plaintiffs' claim and informing this intervener that he could do that in his own action then pending in said court and on its calendar for trial;

That at the time of the trial of said action No. 17,800 and at the time of the rendering and entry of judgment therein, and for a long time prior thereto, Courtney L. Moore, the attorney of record for the plaintiffs herein, at all of said times was and still is an attorney at law for the said Nash Building Company, Inc., and its president George H. Jovick, and although he permitted a default to be entered against them in said action as hereinbefore stated, he appeared purportedly as the attorney for said defaulting parties on the trial and asked for and was granted leave to participate in the proceedings and soon undertook the prosecution of the action in the plaintiffs' behalf in cooperation, collusion, and association with A. V. Muller who appeared as their nominal attorney, and at the close of the trial made and prepared the findings of fact and conclusions of law which he presented to and had the trial judge sign as his decision in said cause, and this intervener is informed and verily believes and therefore alleges and charges that said action No. 17,800 was instituted by the plaintiffs herein by and through their collusion, connivance, confederation and conspiracy with the said Nash Building Company, Inc., and its presi-

dent George H. Jovick, as part of a plan and scheme conceived by the said Courtney L. Moore and A. V. Muller, to cast the said Nash Building Company, Inc., in judgment upon the aforesaid alleged agreement of sale and purchase, for the purpose and object cheating and defrauding this intervener out of his rights, estate, interest and claim in [23] and to said real property and said personal property and calculated to cut off and eliminate the income tax liens against said rights, estate, interest and claim of this intervener and taxpayer and of his wife Elaine in and to said property. He denies that any, and he denies that all, the circumstances alleged in said paragraph 6 in said complaint herein, vested the plaintiffs with the title to said property or any title or right sufficient in law or in equity to appear and ask for any relief herein.

Second Defense

The complaint fails to state a claim or right of action against the defendant United States of America upon which relief can be granted.

Third Defense

The plaintiffs John W. Fisher and Lurene W. Fisher in seeking equitable remedy and relief herein did not come into equity with clean hands; the Nash Building Company, Inc., was at all times material to their action No. 17,800 in the superior court set forth and alleged in their complaint herein, subservient to them, and its president, George H.

Jovick, and the acts of said corporation, and the participation of said corporation in the acts, transactions, and litigation, in the plaintiffs' complaint herein and in this answer set forth and alleged, ought in fairness and good conscience to be deemed to be the acts and participation of said plaintiffs, John W. Fisher and Lurene W. Fisher, and their attorney Courtney L. Moore, equity looking beyond the mere form that characterizes the procedure.

Fourth Defense

Said alleged judgment of the superior court of the state of California in and for the county of San Luis Obispo, so procured and made and entered in said action No. 17,800 as aforesaid, and all proceedings and rights, predicated thereon, were and are null and void, on the face of such judgment, and the judgment roll in said action, for lack of jurisdiction of the subject matter, and from the want of power to grant relief contained in the [24] judgment.

Wherefore, this intervening defendant having fully answered to the complaint, denies that the plaintiffs are entitled to the relief demanded, or any part thereof, and he prays that the judgment in the action No. 17,800 above described be declared, adjudged and decreed to be null and void, and for other proper relief.

H. J. KLEEFISCH,

Attorney for Intervener.

Duly verified. [25]

EXHIBIT A

In the Superior Court of the State of California in
and for the County of San Luis Obispo

No. 17745

CHARLES TESSEYMAN,

Plaintiff,

vs.

JOHN W. FISHER, LURENE W. FISHER,
CLEO S. CLINTON, LORETTA I. CLIN-
TON, GEORGE H. JOVICK, LEONARD R.
JACOBSON, NASH BUILDING CO., INC.,
CALIFORNIA PACIFIC TITLE INSUR-
ANCE COMPANY, and TITLE INSURANCE
and TRUST COMPANY,

Defendants.

COMPLAINT
(Declaratory Relief, etc.)

Plaintiff complains of the defendants and for
cause of action alleges, that:

1. At all times herein mentioned the defendants
John W. Fisher and Lurene W. Fisher were and
now are husband and wife; and plaintiff is in-
formed and believes and upon such information and
belief alleges that at all times herein mentioned
the defendants Cleo S. Clinton and Loretta I. Clin-
ton were and now are husband and wife.

2. At all times herein mentioned each of the
defendants California Pacific Title Insurance Com-

pany, Title Insurance and Trust Company, and Nash Building Co., was, and now is, a domestic corporation, incorporated under the laws of the state of California.

3. During all of the time and times herein mentioned the defendants George H. Jovick and Leonard R. Jacobson have been, and at all the various times where they or the said George H. Jovick are or as hereinafter mentioned were, and still are, jointly and cooperatively conducting and transacting business and real estate operations and exchanges by and through the agency and instrumentality, and in and under the name, of Nash Building Co., Inc., one of the defendants herein.

As now and during all of said time and times they have always controlled and named, and they, the said George H. Jovick and Leonard R. Jacobson, do now control and name, by and through the ownership and control of all or substantially all of the issued shares of stock of said Nash Building Co., Inc., the directors and officers of said company, and the said defendants have always been and now are in full possession, control and dominion of the affairs, business and property or [26] whatever it may be of said defendant company, as plaintiff is informed and believes and therefore alleges, and have conducted, operated and controlled the same, as now, agreeable to their own interests, their own conveniences, their own resolves, and their own advantages and gains.

4. On February 10, 1949, the plaintiff was, and for a long time prior thereto had been, the owner and in possession of certain real property situate in the city and county of San Francisco, state of California, described as:

Beginning on the Southerly line of Eddy Street at a point distant thereon 137 feet and 6 inches from the Westerly line of Mason Street; running thence Westerly along the Southerly line of Eddy Street 55 feet; thence at a right angle Southerly 137 feet and 6 inches; thence at a right angle Northly 137 feet and 6 inches to the point of beginning;

with the building and improvements thereon consisting of a hotel building containing about 120 rooms, together with the furniture, furnishings, fixtures and equipment located and contained in or about said hotel building and premises, which said real and personal property then was subject to and security for the payment of a deed of trust and chattel mortgage indebtedness amounting to \$56,000.00, and which property was and is known as the "Dunloe Hotel" and is hereinafter sometimes referred to as the "Dunloe Hotel property."

5. The defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton were, on the 10th day of February, 1949, and for a long time prior thereto, the owners and in possession of certain real property located on 101 Highway and situate partly within and partly outside the city of

San Luis Obispo, county of San Luis Obispo, state of California, and hereafter described; together with the buildings and improvements thereon and the furniture, fixtures and equipment located and contained in or about said buildings and premises, which said property was and is known as "Motel Inn" and is hereinafter sometimes referred to as the "Motel Inn property." On said 10th day of February, 1949, the said Motel Inn property was subject to and security for the payment of a deed of trust and chattel mortgage indebtedness in the principal sum of \$46,032.01 with interest thereon at the rate of five (5%) per cent per annum.

6. On and prior to the 10th day of February, 1949, the defendant George H. Jovick had suggested and proposed to plaintiff that plaintiff trade and exchange his said Dunloe Hotel property hereinabove described, subject to the aforesaid deed of trust [27] and chattel mortgage indebtedness against said property in the amount of \$56,000, for the said Motel Inn property hereinabove mentioned and hereinafter described, subject to the aforesaid deed of trust and chattel mortgage indebtedness against said last mentioned property in the amount of \$46,032.01, together with the on-sale general liquor license issued by the State Board of Equalization of the State of California for the sale and dispensing of alcoholic beverages on said premises, and said George H. Jovick had informed plaintiff that such exchange and trade could be made, on said terms, provided that the exchange and trade

could be made, on said terms, provided that the exchange and trade be carried out and consummated by the plaintiff and the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton making and executing, and depositing in escrow, the necessary instruments to transfer and convey to the defendant Nash Building Co., Inc., as an intermediate title holder, transferee, grantee, or "dummy," the title to their respective property involved, except the said liquor license, which was to be directly transferred to plaintiff, because the said defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton so insisted, directed and required; and, that, the plaintiff had notified the said George H. Jovick that he would make and consummate, and was ready to make and consummate, said exchange and trade of properties, on said terms and in said manner.

7. Pursuant to the terms and conditions of the aforesaid oral arrangements and understandings, for the exchange of said Dunloe Hotel property for said Motel Inn property, the plaintiff executed and acknowledged before a notary public, a deed and a bill of sale wherein the defendant Nash Building Co., Inc., was and is named as the grantee and vendee, respectively, and describing and conveying the title to said Dunloe Hotel property and, on the 10th day of February, 1949, deposited said deed and bill of sale in escrow with the defendant California Pacific Title Insurance Company; thereupon and prior to the 17th day of February, 1949, the

defendants George H. Jovick and Leonard R. Jacobson, under and in the name of the defendant Nash Building Co., Inc., and the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton, executed and acknowledged before a notary public the necessary deeds and bills of sale to transfer, convey and vest the title to the aforesaid Motel Inn property and deposited said deeds and bills of sale in escrow [28] with the defendants California Pacific Title Insurance Company and Title Insurance and Trust Company for delivery to plaintiff.

8. On February 17th, 1949, and while the aforesaid deed and bill of sale deposited by plaintiff in escrow with the defendant California Pacific Title Insurance Company, transferring and conveying the title to said Dunloe Hotel property as hereinbefore stated, were held by said defendant title company in escrow, the defendants George H. Jovick and California Pacific Title Insurance Company notified plaintiff and represented to him that it was absolutely necessary, if plaintiff desired to complete said exchange of properties and escrow, that plaintiff forthwith authorize and direct the defendant California Pacific Title Insurance Company, in writing, to deliver or record the said deed and bill of sale, and that if the plaintiff's end of said exchange, transaction and escrow was not immediately completed, and the said deed and bill of sale delivered or recorded, the instruments transferring and conveying the title of the aforesaid Motel Inn property

to plaintiff, which has been deposited with and then were held in escrow to complete the exchange transaction hereinbefore mentioned, would be withdrawn from said escrow.

9. Thereupon the plaintiff, on said 17th day of February, 1949, authorized and directed the defendant California Pacific Title Insurance Company, in writing, to deliver or record the said deed and bill of sale deposited by plaintiff in escrow with said defendant; that said written authorization was prepared by the defendants George H. Jovick and said title company and was signed by plaintiff at their instance, request and direction, and under the circumstances and by reason of the representations made by them as to the withdrawal of escrow instruments and the imperative necessity for said authorization as in paragraph 8 of this complaint set forth and alleged.

10. (a) As appears upon the public records of the city and county of San Francisco and as plaintiff alleges the fact to be, the defendant California Pacific Title Insurance Company on the 23rd day of February, 1949, caused said deed from plaintiff to said Nash Building Co., Inc., to be recorded in Book 5128 of Official Records, at page 439, in the office of the Recorder for said city and county of San Francisco.

(b) As appears upon the public records of the city and county of San Francisco and as plaintiff alleges the fact to be, the defendants George H.

Jovick and [29] Leonard R. Jacobson, under and in the name of the Nash Building Co., Inc., and as the president and secretary, respectively, of said defendant company, on and prior to said 23rd day of February, 1949, had made, executed and acknowledged before a notary public, and deposited with the defendant California Pacific Title Insurance Company, and on said day the said defendant title company caused to be recorded in Book 5128 of Official Records, at page 440, a deed transferring and conveying to one Charles Brown, a widower, the title to the same real property described in and transferred and conveyed by the aforesaid deed from the plaintiff to the defendant Nash Building Co., Inc., recorded in said Book 5128 of Official Records, at page 439, in the office of the Recorder for said city and county of San Francisco, and hereinabove mentioned and referred to; that prior to the recordation of said deeds the furniture, furnishings and equipment located and contained in or about the said Dunloe Hotel and described in and covered by the aforesaid bill of sale from plaintiff to the defendant Nash Building Co., Inc., were sold by and through the defendants George H. Jovick and Leonard R. Jacobson to three individuals, namely, Louis Rosenberg, Rose Rosenberg and Mary Triebwasser.

(c) All the consideration for the aforesaid sale, transfer, conveyance and disposition of said Dunloe Hotel property to said Charles Brown, Louis Rosenberg, Rose Rosenberg and Mary Triebwasser, and all the proceeds derived, accruing and resulting

therefrom, including a certain promissory note in the principal sum of \$14,104.19, made, executed and delivered by the said Louis Rosenberg, Rose Rosenberg and Mary Triebwasser to the Nash Building Co., Inc., and secured by a chattel mortgage covering the furniture, furnishings and equipment of said Dunloe Hotel, were received and retained by the defendants including the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton; said consideration and proceeds amounted in the aggregate to upwards of \$140,000.00 as plaintiff is informed and believes and therefore alleges, and the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton receiving a substantial part thereof including the said promissory note and chattel mortgage.

11. Plaintiff alleges that by reason of the foregoing facts and circumstances, and of the terms and conditions of said exchange and trade of properties, given over and delivered or caused to be delivered all property and consideration stipulated and [30] agreed to be given and delivered by him in exchange for said Motel Inn property and the plaintiff thereby became entitled and ever since the 23rd day of February, 1949, has been and now is entitled to receive from the defendants the necessary and proper instruments to transfer and convey the title of said Motel Inn property to him.

12. The real property which was to be transferred and conveyed to plaintiff, under the terms

and in accordance with the conditions of said real estate transaction and escrow, in exchange for said Dunloe Hotel property which has been transferred, conveyed, sold and disposed of, as hereinbefore stated, is all that part of the West half of the Northwest quarter of Section 25 in Township 30 South, Range 12 East, Mount Diablo Base and Meridian, partly within and partly outside the city of San Luis Obispo, county of San Luis Obispo, state of California, and described as:

(Here follows legal description of Motel Inn property.)

13. Under and in accordance with the terms and conditions of said real estate transaction and escrow, and with the knowledge and consent of the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton, the plaintiff entered into possession of said Motel Inn property, and the said defendants transferred or caused to be transferred to him the general on sale liquor license issued by the State Board of Equalization of the State of California for the sale of alcoholic beverages at said premises, and plaintiff ever since the 25th day of March, 1949, has been and now is in the actual possession and entitled to the possession of said Motel Inn property, as owner thereof, thus giving actual notice to the entire world that this plaintiff possessed and occupied the same.

14. Subsequently the plaintiff paid to the Bank of America National Trust and Savings Associa-

tion, at its branch in the city of San Luis Obispo, the holder of the aforesaid deed of trust and chattel mortgage indebtedness against and upon said Motel Inn property, interest which became due thereon, to wit, \$1,317.02 and, in addition thereto, \$1,682.98 on account of the principal of said indebtedness; and in all other respects the plaintiff has exercised and enjoyed all rights and incidents of ownership of the said Motel Inn property, and each and every part thereof.

15. All of said defendants above named claim some right, title or interest in or to said Motel Inn property above mentioned and described, adverse to this plaintiff and his ownership of said property, both real and personal, but plaintiff [31] alleges that none of said defendants have any right, title or interest in or to said real and personal property or to any part thereof either in law or in equity except as subject to the plaintiff's first and superior right and estate therein, and as his trustee and agent.

16. The claims to said Motel Inn property so made by the defendants cloud the title of plaintiff thereto, and tend to depreciate the market value thereof, and tend to depreciate the market value thereof, and prevent plaintiff from handling said Motel Inn property and premises in the manner most to his interests as owner thereof.

17. The defendants California Pacific Title Insurance Company, Title Insurance and Trust Com-

pany, Nash Building Co., Inc., George H. Jovick and Leonard R. Jacobson have in their possession or under their control the conveyances to transfer and vest the title and evidence of ownership to said Motel Inn property in this plaintiff, in accordance with the terms and conditions of the aforesaid real estate exchange transaction, but said defendants have failed and refused and still refuse to deliver such conveyances and evidences of ownership to this plaintiff and, contrary to the terms and conditions of said real estate exchange transaction which has been fully performed and completed so far as this plaintiff and his property was involved therein, as hereinbefore stated, the said defendants are attempting to compel this plaintiff to pay a sum of money which he did not agree to pay and in no way is obligated to pay, as a condition prerequisite for the delivery of such conveyances and evidence of ownership to him.

18. By reason of the premises, and of the foregoing claims, acts and refusals of the defendants to complete the real estate transaction and deliver the said conveyances and evidences of ownership to plaintiff, the plaintiff has sustained damage in the sum of \$50,000.00.

19. Plaintiff is ever ready and willing to do equity and to carry out his agreements and discharge his just obligations, and upon order of court, to pay into court the amount that may be found due to any of the defendants from this plaintiff, for escrow and title insurance charges or otherwise.

Wherefore, plaintiff prays judgment as follows:

1. That the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton, [32] Loretta I. Clinton, George H. Jovick, Leonard R. Jacobson and Nash Building Co., Inc., to be adjudged and decreed to hold their said interest and record title to said Motel Inn property, situate in the county of San Luis Obispo, this state, as trustees for and in trust for this plaintiff, and that the said defendants be adjudged and decreed to deed or cause to be deeded and conveyed to the plaintiff Charles Tesseyman the said property subject to a deed of trust and chattel mortgage indebtedness not exceeding \$46,032.19;

2. That the defendants be directed and required to deliver to plaintiff a good and sufficient deed and bill of sale of said real and personal property, and that they pay to plaintiff the sum of \$50,000.00 as and for damage plaintiff has sustained because they did not deliver such deed and bill of sale to this plaintiff when the same should have been delivered; and that in the event of their neglect or failure so to do within a time to be fixed by the court, then that the clerk thereof, acting in the capacity of a commissioner or master in chancery, be appointed, authorized and directed by the court to make, execute and deliver said deed and bill of sale of said real and personal property to plaintiff;

3. That the court take cognizance of all matters set forth in this complaint and of all the rights and equities therein concerned and adjust the same;

that the defendants and each of them be required to make answer to this complaint and set forth the nature of their respective rights, claims and demands if any they have, that their rights, titles and equities, if any be found, and all adverse claims of each of said parties, be determined and adjudged subordinate and inferior to the rights and title of the plaintiff;

4. That the title of the plaintiff to said Motel Inn property, both real and personal, be quieted as against all of the said defendants, that plaintiff have judgment against the defendants jointly and severally for the sum of \$50,000.00 and for his costs and for such other and further relief as equity and the exigencies of the case may require and which may be just.

/s/ HENRY J. KLEEFISCH,
Attorney for Plaintiff.

(verification)

[Endorsed]: Filed March 10, 1950. [33]

EXHIBIT "B"

[Title of Court and Cause.]

ANSWER

of Defendant Charles Tesseyman.

The defendant Charles Tesseyman makes his answer and answers to the complaint herein as follows:

2. Said defendant admits the allegations contained in the paragraphs of said complaint numbered I, II, and IV, and that he claims some interest in the real and personal property mentioned and referred to in paragraph numbered III of said complaint, but said defendant denies that any interest he may have or assert, either severally or jointly with any other defendant, in or to said real or personal property, or any part thereof, exclusive of the excepted liquor license, is subordinate or subject to any of the plaintiffs' alleged claim and right or claim or right to specific performance of the alleged agreement or any other right or claim whatsoever of the plaintiffs herein, and further answering, in this connection, said defendant alleges that no agreement, written or oral, enforceable or capable of being enforced by an action for specific performance of contract appears from or is shown by the allegations of said complaint and the exhibits attached thereto, to exist as to either the said real or personal property.

3. Said defendant denies, specifically and generally, conjunctively and disjunctively, each and every allegation in the complaint, not herein admitted, controverted or specifically denied, except that the allegations in paragraph numbered XI as to escrow instructions are admitted. And this defendant here and now adopts as part of his answer in this behalf the complaint filed by him in this court in an action in equity relating to the real and personal property involved in and sought to be affected by the present action, and wherein this defendant is plaintiff and the said John W. Fisher, Lurene W. Fisher, Cleo S. Clinton, Loretta I. Clinton, Nash Building Co., Inc., George H. Jovick, their associates and privies, are defendants, and which complaint and action in equity is numbered 17745 upon the records of this court, and copies of which complaint [34] in said action, which was pending at the time of the commencement of the present action, have been served upon the said John W. Fisher and Lurene W. Fisher, the plaintiffs herein, and the said Nash Building Co., Inc., George H. Jovick and others, insofar as the allegations in the complaint in said action No. 17745 are applicable to the defense of this answering defendant.

For a second, separate and distinct defense to the said complaint herein:

3. Defendant alleges that at the time of the commencement of this action, there was and is now pending in this court an action in equity brought by this defendant against the plaintiffs Jack W.

Fisher and Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton, who are mentioned in the said plaintiffs' complaint herein and under whom they claim an interest in and to the real and personal property involved, and also the Nash Building Co., Inc., and George H. Jovick, their associates and privies, upon and with respect to the same real and personal property and transaction and escrow mentioned and described in the complaint herein, which action is numbered 17745 upon the records of this court and is still undetermined; that the said Jack W. Fisher and Lurene W. Fisher have been served with copy of summons and complaint in said action, and this court in said equity action can do complete justice between the parties and settle and dispose of the rights, claims, equities and priorities, if any, and give effect to their contracts legally made.

4. At the time of the commencement of said action numbered 17745, on the 10th day of March, 1950, this defendant caused a notice of the pendency of said action to be recorded in the office of the Recorder for the County of San Luis Obispo, State of California, and said notice, of which a copy is attached to this answer, marked Exhibit A, and made a part hereof, was recorded in Volume 555 of Official Records, at page 201, in the office of said county recorder. That, as appears by and from the complaint in said action and as this defendant alleges the fact to be, all the matters and things involved in this action are involved in the said former action. [35]

For a third, separate and distinct defense to the said complaint herein:

5. Said defendant admits the allegations contained in the paragraphs of said complaint numbered I, II, and IV, and that he claims some interest in the real and personal property mentioned and referred to in paragraph III of said complaint, but said defendant denies that any interest he may have or assert, either severally or jointly with any other defendant, in or to said real or personal property, or any part of or either thereof, exclusive of the excepted liquor license, is subordinate or subject to the plaintiffs' alleged claim and right or claim or right to specific performance of the alleged agreement or any other right or claim, if any, of the plaintiffs herein, and further answering, in this connection, said defendant alleges that no agreement, written or oral, enforceable or capable of being enforced by an action for specific performance of contract appears from or is shown by the allegations of said complaint and the exhibits attached thereto, to exist as to either the said real or personal property.

6. Said defendant denies each and every allegation and statement contained in the paragraph numbered V of said complaint, and further answering the allegations and matter undertaken to be set forth in said paragraph, this defendant alleges and says that they are contrary to and are in contradiction and variance of the terms, provisions, conditions and stipulations set forth and contained in the

“Escrow Instructions,” attached to said complaint as Exhibit A thereto, subscribed by the plaintiffs herein.

7. Said defendant admits that the written escrow instructions attached to said complaint as Exhibits A and B thereto, were placed with the Title Insurance and Trust Company, at its branch in the city of San Luis Obispo, State of California, under its escrow number 41209, but he denies that said escrow instructions were given or so placed by the parties thereto, or any of them, under or pursuant to the alleged agreement of sale of said real and personal property or any part thereof, as in paragraph VII of said complaint alleged.

8. Said defendant denies that Cleo S. Clinton and Loretta I. Clinton or either of them have conveyed or transferred or assigned their right or title or interest in and to the alleged or supposed agreement of sale, or to the property [36] alleged to be covered thereby, or to any or all benefits, accrued or to accrue, from said escrow number 41209, to the plaintiffs John W. Fisher and Lurene W. Fisher, or either of them. He denies that ever since the date, if any, of the alleged transfer and assignment, the said plaintiffs have been or still are the owners, or either of them has been or still is the owner, of the said real and personal property, subject to the alleged agreement of sale. And further answering, in this behalf, this defendant alleges and says, that the said Cleo S. Clinton and Loretta I.

Clinton have been and were fully paid for any and all rights, interests, estates, titles and benefits that they or either of them, at the time of said escrow, had in or to said real property and said personal property, and that they were so paid through said escrow and with funds and monies deposited and paid into said escrow by the defendants Nash Building Co., Inc., and George H. Jovick and others, for the benefit of this defendant, and therefore the said Cleo S. Clinton and Loretta I. Clinton had nothing to transfer or convey or assign to the plaintiff herein and said plaintiffs are not before this court with clean hands.

9. Said defendant answers the allegations and matters set forth in paragraph X of said complaint, as follows: He denies that possession of the Motel Inn, with or without fixtures, or the stock-in-trade, or the personal property therein located or therewith connected, was delivered to the defendant Nash Building Co., Inc., or its designated agent, if any, and he denies that they or either of them, at the time of the commencement of this action were or was in possession of said property. He denies that the cash sum of \$61,840.94 has been delivered through said escrow to said plaintiffs, and alleges and says that the said sum was paid to the said plaintiffs, and the said Cleo S. Clinton and Loretta I. Clinton, and from which sum the said Cleo S. Clinton and Loretta I. Clinton have been fully paid for their right, title and interest in and to said property, as hereinbefore stated. Defendant admits

all the other allegations and statements in said paragraph X contained.

10. Defendant denies each and every allegation in the complaint, not herein admitted, controverted or specifically denied, and in particular denies the precise amounts of money stated, and any lesser amounts. [37]

For a fourth, separate and distinct defense to said complaint herein:

11. Said defendant alleges that the terms, provisions and conditions of the escrow instructions mentioned and referred to in said complaint, in all material matters and respects, including time and manner of performance by the alleged vendee, have been waived by the acts, conduct and doings of the vendor parties thereto, including the plaintiffs herein, and the said plaintiffs are, and each of them is, estopped to assert any claim or right to specific performance, or any right or claim in respect to or affecting the said property, real or personal, under or through said escrow instructions, and in particular the said personal property because, if it is true, which is denied, that the stipulated and agreed sale and purchase price for said personal property was and is \$37,500.00 then the plaintiffs and Cleo S. Clinton and Loretta I. Clinton, as the former joint owners and vendors thereof, by plaintiffs' own admission and showing in their complaint; and otherwise, have been paid and they have received through the escrow alleged in said complaint, the full amount

due and payable to them for said personal property, under and pursuant to such alleged agreement of sale.

Wherefore, defendant denies that the plaintiffs are entitled to the relief prayed for in the complaint, or any part thereof, or to any other relief whatsoever against this defendant, and prays that the complaint be dismissed as to him with costs assessed against the plaintiffs, and for such other and further relief as may be just and proper.

/s/ H. J. KLEEFISCH,
Attorney for Defendant,
Charles Tesseyman.

(Verification.) [38]

EXHIBIT A

In the Superior Court of the State of California,
in and for the County of San Luis Obispo

No. 17,745

CHARLES TESSEYMAN,

Plaintiff,

vs.

JOHN W. FISHER, LURENE W. FISHER,
CLEO S. CLINTON, LORETTA I. CLIN-
TON, GEORGE H. JOVICK, LEONARD R.
JACOBSEN, NASH BUILDING CO., INC.;
CALIFORNIA PACIFIC TITLE INSUR-
ANCE COMPANY, and TITLE INSUR-
ANCE AND TRUST COMPANY,

Defendants.

NOTICE OF PENDENCY OF ACTION

To Whom It May Concern :

Take Notice that an action has been commenced in the above-entitled Court, by the above-named plaintiff, against the above-named defendants, which action is now pending; that the general object of said action is for a declaration and determination that the plaintiff is the owner, in possession and entitled to the possession of the real property and premises in the complaint in said action, and hereinafter, described, and to determine all and every claim, estate or interest therein asserted by said

defendants, or either or any of them, adverse to the said plaintiff, and for other and general relief.

The real property and premises involved in, and to be affected by said action is all that part of the West Half of the Northwest Quarter of Section 25 in Township 30 South, Range 12 East, Mount Diablo Base and Meridian, and partly within and without the City of San Luis Obispo, in the County of San Luis Obispo, State of California, particularly described as follows:

“Beginning at a point on the North boundary line of the City of San Luis Obispo, as said line is defined in the Charter of said City, approved by the Legislature of the State of California, by Resolution adopted Feb. 23, 1911, distant thereon 1506.5 feet West from the Northeast corner of said City and also 16.8 feet East from a stone monument 4"x14"x10" set in said boundary line, and running thence North 12° 16' West, 22 feet to an iron stake set in the southerly line of the California State Highway; thence along said line on the following courses [39] and distances, by a right curve of 430 feet radius, 73.2 feet to a concrete monument set for Sta. 1+55.7 of the official survey of said highway; thence North 68° 14' East 236.6 feet to a concrete monument; thence by a right curve of 220 feet radius 99.6 feet to a concrete monument; thence South 85° 46' East 119.5 feet to a concrete monument; thence by a left curve of 330 feet radius 296.6 feet to a concrete monument; thence North 42° 52' East 44 feet to a stake; thence leaving said line of

said highway and running South $0^{\circ} 13'$ East 234 feet to a stake on the Northerly bank of the San Luis Obispo Creek; thence along said bank South $51^{\circ} 34'$ West 106.2 feet; South $86^{\circ} 39'$ West 200 feet; South $78^{\circ} 43'$ West 192 feet; South $39^{\circ} 22'$ West 130.8 feet to an iron stake; thence leaving said creek bank and running North $12^{\circ} 16'$ West 333 feet to the point of beginning.

“Saving and excepting therefrom that portion thereof conveyed to the State of California for highway purposes by deed dated January 21, 1946, and recorded in Book 402 of Official Records at page 437, records of said County, described as follows:

“All that part of the portion of the West one-half of the Northwest quarter of Section 25, Township 30 South, Range 12 East, Mount Diablo Base and Meridian, conveyed to George H. Jovick by deed dated March 7, 1944, and recorded in Book 358 of Official Records at page 465, records of said County, which lies North of the following described line:

“Beginning at a point on the Northerly boundary line of the City of San Luis Obispo as said line is defined in the charter of the said City, approved by the Legislature of the State of California by Resolution adopted February 23, 1911, distant along said Northerly boundary line, Westerly 18.75 feet from the stone monument described in the above-mentioned deed as having dimensions $4'' \times 14'' \times 10''$; thence (1) from a tangent which bears North

50° 59' East, along a curve to the right, with a radius of 370 feet, through an angle of 17° 15' for a distance of 111.40 feet, the Northeasterly 73.2 feet last-described course being a portion of the Northerly boundary line of the parcel of land conveyed in the above-mentioned deed; thence, continuing along said Northerly boundary line, (2) North 68° 14' East 236.60 feet; thence continuing along last said boundary line (3) along a curve to the right tangent to last-described course, with a radius of 220 feet, through an angle of 0° 39' 13" for a distance of 2.51 feet; thence leaving said boundary line (4) South 88° 55' East, 169.36 feet; thence (5) North 85° 03' 50" East, 343.45 feet to a point on or near the Easterly boundary line of the parcel of land described in the above-mentioned deed distant South 20° 03' 50" East, 88.59 feet from a concrete monument set at the Southwesterly terminus of the course described as 'North 42° 52' E., 44 ft.,' in last said deed; thence (6) continuing North 85° 03' 50" East, 100 feet."

Dated: March 6th, 1950.

H. J. KLEEFISCH,
Attorney for Plaintiff.

(Affidavit of service by mail.)

[Endorsed]: Filed July 26, 1950.

[Endorsed]: Filed March 17, 1954. [40]

[Title of District Court and Cause.]

AFFIDAVIT OF COURTNEY L. MOORE IN
OPPOSITION TO MOTION OF CHARLES
TESSEYMAN TO INTERVENE

State of California,
City and County of San Francisco—ss.

Courtney L. Moore, being first duly sworn, deposes and says:

That he is an attorney at law, duly admitted to practice in the Courts of the State of California and in the District Courts of the United States for the Southern District of California, Central Division; that in the actions referred to in the proposed answer of intervener, namely, action No. 17745, entitled Charles Tesseyman vs. John W. Fisher, et al., and action No. 17800, entitled John W. Fisher, et al., vs. Nash Building Co., et al., filed in the Superior Court of the State of California, in and for the County of San Luis Obispo, your affiant represented Nash Building Co., George H. Jovick and Leonard R. Jacobson, and is familiar with all of the facts in connection with the said litigation; that George H. Jovick was at all times president of the Nash Building Co., a California [42] corporation; that your affiant had, prior to the events hereinafter set forth, represented said George H. Jovick as his attorney in other matters; that shortly prior to December 6, 1950, said George H. Jovick communicated with your affiant and informed him that he and the Nash Building Co. and Leonard

R. Jacobson had been sued in two actions pending in San Luis Obispo County, to wit: actions Nos. 17745 and 17800; that the said George H. Jovick at said time informed your affiant that he had been seriously ill, and for a period of time had not been expected to live, and was at the time he communicated with your affiant an ill and sick man;

That your affiant investigated the status of the said litigation and learned that in the action entitled John W. Fisher, et al., vs. Nash Building Co., No. 17800, the default of the Nash Building Co., George H. Jovick and Leonard R. Jacobson had been entered of record and that they were in default in the action entitled Tesseyman vs. Fisher, et al., No. 17745, but that no default had been entered; that thereupon your affiant secured from Henry J. Kleefisch, attorney for said Charles Tesseyman, an extension of time to plead for said defendants in said action entitled Tesseyman vs. Fisher, et al.; that at said time said action entitled John W. Fisher vs. Nash Building Co. had been set for trial for the 8th day of December, 1950:

That at the time of said conference with the said George H. Jovick said George H. Jovick displayed to your affiant copies of the escrow instructions which had been deposited with the Title Insurance and Trust Company of San Luis Obispo, and informed your affiant that the Nash Building Co. had, in accordance with said escrow instructions, agreed to purchase from the said John W. Fisher, Lurene W. Fisher, his wife; Cleo S. Clinton and Loretta I.

Clinton, his wife, real and personal property in San Luis Obispo known as the Motel Inn, for the sum of \$155,000; that the total purchase price had not been paid; that after investigation your [43] affiant informed the said George H. Jovick that in his opinion it was futile to file a motion to set aside said default for the reason that the only relief would be under Section 473 of the Civil Code of Procedure of the State of California, and in order to make a motion under said section it was necessary for defendants against whom a default had been entered to make an affidavit of merit, to wit: that they had a meritorious defense to said action, and that in the opinion of your affiant neither said Nash Building, George H. Jovick or Leonard R. Jacobson had any meritorious defense to said action; that in the action entitled *Tesseyman vs. Fisher, et al.*, as appears by Exhibit A attached to the proposed answer of said intervener, said Tesseyman prayed for monetary judgment in the sum of \$50,000, and your affiant informed said defendants, namely, Nash Building Co., George H. Jovick and Leonard R. Jacobsen, it was necessary to defend said action; that said action entitled *Fisher vs. Nash Building Co., et al.*, had been set for trial for the 8th day of December, 1950; that your affiant at said time proceeded to San Luis Obispo representing said defaulted defendants, and for the first time met or conversed with A. V. Muller and/or John W. Fisher, or any other party to said action, all of whom, up to that time, had been complete strangers to your affiant; that in said action your

affiant, representing the said Nash Building Co., George H. Jovick and Leonard R. Jacobson, admitted in open court the due execution of said escrow instructions and the signing of the same by the said Fisher, Clintons and Nash Building Co.; that said George H. Jovick did not accompany your affiant to San Luis Obispo for the reason that his doctor had told him that it might imperil his life to make such a trip;

That thereafter your affiant prepared and filed an answer for said Nash Building Co., George H. Jovick and Leonard H. Jacobson in the action entitled *Tesseyman vs. Fisher, et al.*, No. 17745, [44] denying the various allegations of the complaint therein, a copy of which answer is attached to this affidavit marked Exhibit A and made a part hereof; that thereafter the said action entitled *Tesseyman vs. Nash Building Co.*, No. 17745, was set for trial for the 9th day of January, 1951, and was in fact tried in part on the 9th and 10th days of January, 1951, and was continued to the 15th day of February, 1951, for the purpose of taking, in the interim, the deposition of George H. Jovick, which deposition was taken in San Francisco for the reason that because of his health he was under doctor's orders and it was impossible for him to be and appear in said action; that at the time of the taking of the said deposition said Henry J. Kleefisch was present and examined the said George H. Jovick, and said deposition was entered in evidence at the date set for said continuance, to wit, February 15, 1951.

During the course of the trial the following witnesses were summoned and examined: John W. Fisher, Leonard R. Jacobson, George H. Jovick, George E. McCraith, Allen S. Mobley, Charles Tesseyman, Arthur E. Giubini;

That it appears by the allegations of the complaint in the action entitled *Tesseyman vs. Fisher, et al.*, that the said Charles Tesseyman made the same claim which he is making in the present answer in intervention;

That after a full and complete hearing in said Superior Court action at which witnesses were sworn and in which action the said Charles Tesseyman was sworn as a witness and was examined by counsel, namely: Henry J. Kleefisch and Reed M. Clarke, the Honorable Anthony Brazil, presiding Judge, decided there was no merit in the claim presented by the said Charles Tesseyman; that co-defendants in said action were the Title Insurance and Trust Company, of San Luis Obispo, and California Pacific Title Insurance Company, of San Francisco, both of whom were represented by [45] counsel and presented evidence; and that said court at said time held that said title companies had acted in good faith and that said escrow instructions were not prepared and made up by the said title companies at the specific instance and request of said George H. Jovick, but were prepared at the request of all parties concerned.

Answering the allegations contained on page 4 of said answer in intervention affiant denies that

in said action No. 17800 brought by the said John W. Fisher, et al., or that there was no cause of action, for said Superior Court of the State of California held that there was a cause of action, and that it had jurisdiction of the same, and rendered a judgment against said proposed intervener, which judgment was affirmed by the District Court of Appeal of the State of California, and a hearing in the Supreme Court of the State of California was denied.

Affiant admits said action No. 17745 was commenced by the said Charles Tesseyman and admits as stated by said Tesseyman, that said Superior Court acquired complete and exclusive jurisdiction of said real and personal property and of any and all rights and interests claimed by the plaintiffs in the subsequent action No. 17800, which said court recognized as existing rights and in said actions said court adjudicated the rights of said parties.

Your affiant denies that at the time of rendering and entering said judgment in action No. 17800 and for a long time prior thereto, that your affiant was the attorney for the Nash Building Co., in this connection refers to the statements heretofore made; denies that your affiant permitted a default to be entered against said parties in said action but as heretofore stated, your affiant again repeats that said defaults were entered in said action before he even knew of the existence of said litigation; denies that he undertook the prosecution of said action on the plaintiff's behalf; admits that the court did

permit him to appear and state the position [46] of the Nash Building Co.; denies that he did in any way act in cooperation, collusion or association with the said A. V. Muller, the attorney for the said Fishers in said action, and as heretofore stated, that for the first time it was in said action that your affiant first met the said A. V. Muller; denies that your affiant prepared the findings of fact or conclusions of law in said action, and in this connection states that they were prepared by the said A. V. Muller without consultation with your affiant, and in the usual manner pursued by attorneys having successfully prosecuted a suit, and which were, in accordance with California law, served on your affiant as attorney for the defendants. Denies that said action No. 17800 brought by the said Fisher was instituted by the plaintiffs through collusion, connivance, confederation and conspiracy with the Nash Building Co., or its president, George H. Jovick, or as part of any plan or scheme conceived by your affiant and the said A. V. Muller to cast the said Nash Building Co. in judgment upon any alleged agreement of sale and purchase for the purpose and object of cheating and defrauding the proposed intervener, and in this connection repeats the statements heretofore made, that said action was brought by said Fishers and said Clintons at a time when the said George H. Jovick was ill and not expected to live, and defaults were entered before said Jovick ever consulted with your affiant; that it is not true that your affiant in any way joined in or had any object or purpose in

cheating or defrauding said Charles Tesseyman out of any rights, interest or claim in or to any real or personal property or calculated to cut off and eliminate any income tax liens against said rights, and in this connection your affiant states that he was unaware of the existence of any income tax lien or of any income tax owing by said Tesseyman and/or his wife, until after the decision of the District Court of Appeals of the State of California on the 3rd day of December, 1952, when, for the first time, affiant knew or heard of [47] any such liens; that your affiant learned of said liens by being informed of their existence by the said John W. Fisher; that during the progress of said trials and the appeals to the District Court of Appeals of the State of California, your affiant over a period of approximately two years became acquainted with the said John W. Fisher; that after the said John W. Fisher learned of said tax liens he informed your affiant that he had discussed the matter with the said A. V. Muller, and the said A. V. Muller had informed the said John W. Fisher that he did not feel himself competent or informed so as to be capable of handling an income tax controversy, and suggested to said John W. Fisher that he secure other counsel, and the said John W. Fisher at said time requested your affiant to act for him in said income tax matter, which was the first time your affiant had in any way acted for or represented the said John W. Fisher.

Your affiant denies each and all of the allegations and statements contained in the second, third and

fourth defense set forth in said proposed answer in intervention and your affiant further states that said Charles Tesseyman and Elaine Tesseyman at all times herein set forth were represented by able counsel of their own choice, Henry J. Kleefisch and Reed M. Clarke, attorneys duly licensed to practice before the courts of the State of California; your affiant further, by reference, embodies as a part of this affidavit each and all of the statements of fact and law found in the decisions of *Fisher v. Nash Building Co.*, 113 CA2d 397, and *Tesseyman v. Fisher, et al.*, 113 CA2d 404.

/s/ COURTNEY L. MOORE.

Subscribed and sworn to before me this 19th day of March, 1954.

[Seal] /s/ FRANCES R. WIENER,
Notary Public in and for the City and County of
San Francisco, State of California. [48]

Memorandum of Points and Authorities

Rule 3 of the U. S. District Court provides that failure of the moving party to file any instruments or memorandum of points and authorities shall be deemed a waiver by the moving party of the pleading or motion. Rule 3 expressly provides that the moving party shall serve and file with the notice of motion such a memorandum. The moving party has failed to do so.

The pleading accompanying motions to intervene should set up interests of intervener.

Rule 24 of Civil Procedure of District Courts.

An intervention introducing litigation having no relation to that opened by original complaint will not be permitted.

Rule 24

Babcock v. Town of Erlanger,
34 Fed. Supp. 293

Final judgment of a state court cannot be collaterally attacked except on the basis of extrinsic fraud, even if the allegations of the intervener's answer would be true, they show on the face of it that there is no extrinsic fraud. Summarizing, then, they merely state that the attorney for one of the defendants conspired with the attorney for the plaintiff.

Throckmorton vs. U.S. 98 U.S. 61

Pico vs. Cohn, 91 Cal. 129

Applicant attacks two judgments rendered by the Superior Court of the State of California, in and for the County of San Luis Obispo, and affirmed by the District Court of Appeals of the State of California, both of which courts had jurisdiction of the subject matter, and such judgment is not open to collateral attack.

Dowdy v. Hawfiell, 189 F. 2d 637

Respectfully submitted,

/s/ COURTNEY L. MOORE,
Attorney for Plaintiff.

Affidavit of mail attached.

[Endorsed]: Filed March 22, 1954. [49]

[Title of District Court and Cause.]

MINUTES OF THE COURT—MARCH 29, 1954

At: Los Angeles, Calif.

Present: Hon. Ernest A. Tolin,
District Judge.

Proceedings: For hearing on motion of Charles Tesseyman for leave to intervene as party-defendant.

Plaintiff orally moves to strike motion of Chas. Tesseyman, and Court Orders that said motion of Chas. Tesseyman to intervene is Denied.

It Is Further Ordered that def't U.S.A. have 15 days from this date to file reply brief to plaintiff's brief heretofore filed, and plaintiff will either file a reply thereto or notify the Court they will not; whereupon on such advice from plaintiff's counsel, the cause will stand Resubmitted.

Attorney for Chas. Tesseyman makes exceptions to the Court's ruling denying motion to intervene.

EDMUND L. SMITH,
Clerk,

By WM. A. WHITE,
Deputy Clerk. [51]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Charles Tesseyman, applicant for intervention above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final order entered in this action on March 29, 1954, denying his motion for leave to intervene herein as a party defendant.

Dated: this 28th day of April, 1954.

/s/ HENRY J. KLEEFISCH,

Attorney for Charles Tesseyman, Applicant for Intervention.

[Endorsed]: Filed April 29, 1954. [52]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
TRANSCRIPT OF RECORD

Upon application of H. J. Kleefisch, attorney for the above-named applicant for intervention, and pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, it is

Ordered, that said applicant for intervention be granted thirty days additional time, and to and including July 7, 1954, to file the transcript of record on his appeal in this action.

Dated: May 26, 1954.

/s/ ERNEST A. TOLIN,

United States District Judge.

[Endorsed]: Filed May 26, 1954. [55]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 55, inclusive, contain the original Petition for Removal; Answer; Motion to Intervene as a Defendant; Affidavit of Courtney L. Moore in Opposition to Motion of Charles Tesseyman to Intervene; Notice of Appeal; Designation of Record on Appeal and Order Extending Time to Docket Appeal and a full, true and correct copy of Minutes of the Court for March 29, 1954, which constitute the transcript of record on the appeal of Charles Tesseyman to the United States Court of Appeals for the Ninth Circuit.

I further certify that the case was tried on the merits on March 1, 1954, and time fixed for the filing of briefs whereupon the cause was to stand submitted for decision; that the court filed its Memorandum of Decision on April 16, 1954, and that Findings of Fact, Conclusions of Law was filed on May 25, 1954, and that the Decree Quieting Title was filed and entered on May 25, 1954. I also certify that no affidavits in opposition to the motion for leave to intervene were filed except the one in the transcript of record.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

In the United States Court of Appeals
for the Ninth Circuit

No. 14413

JOHN W. FISHER and LURENE W. FISHER,
Plaintiffs and Appellees,

vs.

THE UNITED STATES OF AMERICA,
Defendant,

CHARLES TESSEYMAN,

Intervener and Appellant.

STATEMENT OF POINTS

The appellant states that the points upon which he intends to rely on the appeal taken by him in this action are as follows:

1. Appellant made timely application in the district court for permission to intervene as a party defendant, under the circumstances disclosed by the record in this case, and the district court's ruling, denying his application for permission to intervene, on the sole ground that it was not timely, was and is erroneous.

2. Appellees did not come, into court, and were not before the district court, in an action of purely equitable cognizance, with clean hands.

/s/ HENRY J. KLEEFISCH,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 13, 1954.